IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (LODGING) NO. 254 OF 2005

IN

NOTICE OF MOTION NO. 400 OF 2003

IN

SUMMARY SUIT NO. 129 OF 2001

Mr. Suresh P. Hinduja ... Appellant
(Orig. Defendant)

Versus

M/s. Eskay Enterprises ... Respondent
(Orig. Plaintiff)

Mr. R.S.Tripathi with Smt. P.V.Soni for appellant.

Mr. Ashok R. Sawant, Representative & C.A. of Respondent present.

CORAM: D.K.DESHMUKH &
J.H.BHATIA,JJ.

DATE : 13th August, 2007.

P.C.

1. This Appeal is preferred against the order made by the learned Single Judge dismissing the Notice of Motion taken out by the present appellant for setting aside the decree passed against him in a summary suit. Summary Suit No.129 of 2001 was filed by the present

respondent. Writ of Summons was served on the defendant, who is the present appellant. He engaged an Advocate and instructed him to file his vakalatnama, but the Advocate did not file his vakalatnama. With the result, decree in terms of the provisions of Order XXXVII of the Civil Procedure Code came to be passed against the defendant for failure to put an appearance after being served with the Summons for Judgment.

2. A Notice of Motion was taken out for setting aside the ex-parte decree under Order XXXVII Rule 4 of the C.P.C. The learned Single Judge disposed of that Notice of Motion by an order dated 4th February, 2005. The learned Single Judge held that merely the defendant pointing out sufficient cause for not filing appearance after service of the Summons for Judgment is not sufficient. The defendant has also to satisfy the Court on the basis of the averments made by him in the affidavit that he has good defence to offer. The learned Single Judge found that in the affidavit filed in support of the Motion, there was nothing to indicate that the defendant has good defence to offer and, therefore, the learned Single Judge dismissed the Motion. The present Appeal is directed against that order.

3. We have heard learned Counsel for the appellant

and Shri Ashok R. Sawant, who is a power of attorney holder of the respondent.

4. So far as the merits of the order are concerned, we find that the learned Single Judge was perfectly justified in dismissing the Motion because in the affidavit filed in support of the Motion, case for grant of leave to the defendant was not made out. The learned Counsel appearing for the appellant-defendant stated before us that the defendant is willing to deposit the entire decretal amount in this Court but he should be given an opportunity to contest the Summons for Judgement. In our opinion, the offer is fair and deserves to be accepted. In our opinion, the following order would meet the ends of justice :-

(i) In case the appellant-defendant deposits an amount of Rs.13,00,000/- within a period of three months from today, with due notice to the plaintiff-respondent, the exparte decree passed against the appellant shall stand set aside. In that event, the vakalatnama filed by the Advocate for the defendant in this Appeal shall be treated as vakalatnama filed in the summary suit and then the plaintiff may take out a Summons for Judgment within two weeks and serve it on the Advocate for the defendant. The

defendant shall file an affidavit seeking leave to defend in the Summons for Judgment within a period of two weeks from the date of receiving the Summons for Judgment.

(ii) The Office thereafter shall place the Summons for Judgment for hearing before the appropriate Court.

(iii) On the amount being deposited after the plaintiff takes out Summons for Judgment, the Prothonotary & Senior Master shall permit the respondent-plaintiff to withdraw the amount on furnishing a Bank Guarantee of a Nationalised Bank and also furnishing an undertaking, undertaking to this Court that he will re-deposit the amount if so directed by this Court and on such terms as may be directed by this Court and further undertaking that in that event the rate of interest shall not be less than 12% per annum.

(iv) The disposal of the amount shall be governed by the order that may be passed by the Court in the Summons for Judgment in case Summons for Judgment is taken out as provided above. If the Summons for Judgment is not taken out as

provided above, the disposal of the amount shall be governed by the order that may be passed in the suit by the Court finally.

(v) In case the appellant does not file his affidavit seeking leave to defend within a period of two weeks from the date of deposit, the Summons for Judgment shall be treated as granted and the suit of the plaintiff shall again stand decreed as was done earlier.

(vi) In case the appellant fails to deposit the entire amount as indicated above within a period of three months, in that event the office shall treat this Appeal as dismissed. In that event the decree-holder - plaintiff shall be entitled to execute the decree.

(vii) For a period of three months from today, the execution of the decree shall remain stayed. However, if there are any orders made attaching any property in execution of those orders shall continue to be in force till the deposit is made as directed above.

The Appal is disposed of.

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(D.K.DESHMUKH,J.)

(J.H.BHATIA,J.)